Appendix

SDNY-NYNY
94-CR-518
MARTIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of May, one thousand nine hundred and ninety-seven.

Present:

Honorable Ralph K. Winter,
Honorable Frank X. Altimari,
Honorable José A. Cabranes,
Circuit Judges.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAY 23, 1997
GEORGE LANGE III, CLERK

UNITED STATES OF AMERICA,

Appellee,

v.

No. 96-1523

MARK BARBIERI; ALBERT CAPONE, JR.; STEPHEN CAPONE; DOMINICK CARANO, ANTONIO CORRAGIO; JOHN COSTELLO; LOUIS DONTIS; NICHOLAS DONTIS; MICHAEL FERONE, SR.; PETER LATEMPA; STEVEN RUSSELL; JOSEPH VENDITTELLI; THOMAS VENDITTELLI; DANIEL VULPIS, SR.; DANIEL VULPIS, JR.; JOSEPH ZUCCARELLO,

Defendants,

MARCANGELO COTOIA,

Defendant-Appellant.

Appearing for Appellant:

Michael H. Handwerker, Handwerker Marchelos & Gayner, New York, New York.

Appearing for Appellee:

Roland G. Riopelle, Assistant United States Attorney, Southern District of New York, New York, New York.

Appeal from the United States District Court for the Southern District of New York (Martin, *Judge)*.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Marcangelo Cotoia appeals from a judgment of conviction and sentence following a jury trial before Judge Martin. Cotoia was convicted of one count of conspiring to bribe New York City Department of Sanitation ("DOS") inspectors, in violation of 18 U.S.C. § 371, and one count of bribing DOS inspectors in violation of 18 U.S.C. § 666(a)(2) & (b). He received a sentence of 33 months' imprisonment, followed by a three-year term of supervised release, and a special assessment of $100.

Cotoia argues that his conviction under 18 U.S.C. § 666 must be vacated because the evidence fails to establish that DOS was a federally funded organization, receiving in excess of $10,000 in federal funding. 18 U.S.C. § 666(b). Cotoia also challenges his sentence, arguing that the district court improperly denied a sentence reduction for acceptance of

responsibility and minor participation in the crime. We find all three claims meritless.

Section 666(b) requires that a defendant convicted under Section 666 bribe an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b). Cotoia claims that the government provided evidence only of the City of New York receiving in excess of $10,000 from the federal government, but failed to show that the DOS received federal funds in excess of the amount. We disagree.

Mark Schnabel, the Manager of the DOS Budget Office, testified that in the years relevant to Cotoia's offense, the DOS received more than $7 million of federal funding each year. Cotoia argues that Schnabel's testimony is insufficient because he did not refute the fact that the City of New York first received the federal funds and then decided to allocate them to DOS. Cotoia argues that Schnabel's testimony does not establish the DOS's direct receipt of funds from the federal government. However, nothing in the statute or caselaw requires the federally funded organization to be the original recipient of federal funds. *See United Stated v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996) ("[T]he government need not trace the federal funds received by an organization to the project in connection with which its employee received a bribe"); *United States v. Coyne*, 4 F.3d 100, 108-10 (2d Cir. 1993) (bribe in connection with civic center satisfied Section 666 even though the county received no federal funds that were specifically earmarked for the civic center), *cert. denied*, 510 U.S. 1095 (1994). We therefore find the evidence sufficient to support Cotoia's conviction under Section 666.

Cotoia's claim that the district court committed clear error in denying a reduction for acceptance of responsibility, pursuant to United States Sentencing Guidelines Section 3E1.1, is also without merit. Application Note 2 of Section 3E1.1 states that this reduction does not apply to a defendant "who puts

the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Cotoia twice contested his factual guilt at trial (his first trial resulted in a hung jury) and therefore cannot benefit from this reduction. In addition, Cotoia's attempt to portray himself at sentencing as a "victim" of a ruthless business environment, again trying to minimize his guilt, further undermines his claim of acceptance of responsibility. We thus find no clear error in the district court's denial of a reduction on this basis.

Nor are we persuaded by Cotoia's contention that he should have received a reduction for being a minor participant, pursuant to Guidelines §3B1.2(b). Cotoia participated in the bribery scheme for several years, during which he dumped illegally 102 loads of improper waste at the New York City Landfill at Freshkills, in Staten Island. We find no clear error in the district court's refusal to deem Cotoia's role minor.

We therefore affirm.

/s/ Ralph K. Winter

Hon. Ralph K. Winter, U.S.C.J.

/s/ Frank X. Altimari

Hon. Frank X. Altimari, U.S.C.J.

/s/ José A. Cabranes

Hon. José A. Cabranes, U.S.C.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of August one thousand nine hundred and ninety-seven.

USA

v.

Barbieri, et al.

Dkt No: 96-1523

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED AUG 21 1997
GEORGE LANGE III, CLERK

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Marcangelo Cotoia.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

Each motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED AUG 26 1997
GEORGE LANGE III, CLERK

UNITED STATES OF AMERICA
– against –
BARBIERI ET AL.
(MARCANGELO COTOIA)
DEFENDANT-APPELLANT
Use short title

Docket No. 96-1523

NOTICE OF MOTION FOR STAYING THE MANDATE OF THIS COURT

MOTION BY:
Michael Handwerker, Esq.
HANDWERKER
MARCHELOS & GAYNER
350 Broadway — 10th Floor
New York, NY 10013
212-431-8034

Has consent of opposing counsel:
A. been sought?
Yes☒ No☐
B. been obtained?
Yes☐ No☒
Has service been effected?
Yes☒ No☐
Is oral argument desired?
Yes☐ No☒
(substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))

OPPOSING COUNSEL:
AUSA Roland Riopelle
U.S. ATTORNEYS OFFICE
Southern District of New York
One St. Andrew's Plaza
NY, NY 10007 (212)791-1974

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *(See F.R.A.P. Rule 8)*
Yes☐ No☐
Would expedited appeal eliminate need for this motion?
Yes☐ No☐
If No, explain why not:

Has argument of appeal been set:

A. by scheduling order?
Yes☒ No☐

B. by firm date of argument notice?
Yes☐ No☒

C. If Yes, enter date:

Will the parties agree to maintain the status quo until the motion is heard?
Yes☐ No☐

Judge or agency whose order is being appealed:

Brief statement of the relief requested:

Staying the issuance of the mandate of this Court and allowing the defendant-appellant an opportunity to petition the United States Supreme Court for a writ of certiorari due to a split in the circuits on the legal issue in question.

Complete Page 2 of this Form

By: (signature of attorney)
/s/
Signed name must be printed beneath
MICHAEL HANDWERKER, ESQ.

Appearing for:
(Name of Party)
Defendant
8/25/97

IT IS HEREBY ORDERED that the motion be and it hereby is granted ~~denied~~

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
FILED SEP 11 1997
GEORGE LANGE III, CLERK